Petition

81-682

NO.

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ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1981

DONNIE A. LEBLANC
Plaintiff-Appellant

versus

PETCO, INC., ET AL
Defendants

versus

AMERICAN ASSURANCE COMPANY
Intervenor-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether a waiver of subrogation by a Longshoremen and Harbor Workers' Compensation Act insurer in favor of a third party tortfeasor prevents the insurer's full reimbursement of benefits paid any injured employee under the Act.

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No.

DONNIE A. LEBLANC,
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versus

AMERICAN ASSURANCE COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Donnie A. LeBlanc, petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, printed as Appendix B, p. B-1 ___, hereto, is reported *sub none, LeBlanc v. Petco, Inc., et al. v. American Assurance Company, 647* F. 2d *617* (C.A. 5th Cir., 1981). The District Court's opinion, printed as Appendix A, p. A-1, hereto, is reported as *Leblanc v. Petroleum Equipment Tools Co.* at 489 F. Supp. 488 (W.D. La., 1980).

JURISDICTION

The judgment of the Court of Appeals is dated June 12,1981. An order of the Court of Appeals denying Petitioner's Motion for Rehearing En Banc, printed as Appendix C, p. C-1 ___, is dated August 7, 1981. Jurisdiction of this Court is involved under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This action was commenced by plaintiff appellant, Donnie A. LeBlanc, on May 20, 1976, seeking damages arising out of an accident which occurred July 5, 1975, on a fixed platform owned by Atlantic Richfield Company (ARCO), located on the Outer Con-

tinental Shelf in the Gulf of Mexico off the Louisiana coast. Numerous parties were named as defendants in the original action, but through the use of extensive discovery procedures and pretrial motions only three defendants remained at the time of trial. These defendants were ARCO, owner of the platform upon which the injury occurred, B. J. Hughes, Inc., the manufacturer of a set of rotary tongs in use at the time of the accident, and Petco, the owner and supplier of the tongs in question Respondent, American Home Assurance Company, sought and received permission from the Court to intervene in this action seeking reimbursement of some $18,615.00 in compensation and medical payments paid to Mr. LeBlanc in discharge of its obligations under the Longshoremen and Harbor Workers' Compensation Act.

Under the terms of the contract between Mr. LeBlanc's employer, Atlantic Pacific Marine Corporation (APMC) and the platform owner, ARCO, APMC was required to secure in all policies of insurance taken by it a waiver of subrogation against ARCO as to any acts or omissions in connection with the work covered by the contract. APMC did, in fact, procure an endorsement to its policy of insurance with intervenor-respondent which waived subrogation in favor of ARCO. This waiver was in effect on the date of the accident.

Prior to the trial of the case, a settlement agreement was reached between Mr. LeBlanc and Petco, ARCO and B. J. Hughes, Inc. Under the terms of the settlement, the three defendants paid a total of $50,000.00 to Mr. LeBlanc in settlement of all claims which he had arising out of the accident in question. As no agreement could be reached with intervenor-respondent as to the amount of the compensation and medical benefits which should be repaid to it, that issue alone was presented to the Court for its determination.

The Court ruled that the waiver of subrogation in favor of ARCO had the effect of releasing one of the three joint tortfeasors involved, thus Louisiana law and the ruling of the Fifth Circuit Court of Appeal in *Allen v. Texaco*, 510 F. 2d 977 (C.A. 5th Cir., 1975), intervenor-respondent. The Court thus reduced by one-third (⅓) the amount claimed by intervenor-respondent as a consequence of the waiver of subrogation. The Court further held that as the funds which would be used to satisfy intervenor-respondent's claim had been created through the efforts of plaintiff's counsel intervenor-appellant should be required to bear proportionate share of the counsel fees. Accordingly, a further reduction in the amount of one-third (⅓) was made in the sum found recoverable by intervenor-respondent. A judgment was signed by the Court in keeping with its ruling.

On original hearing, this The Fifth Circuit reversed the decision of the District Court, allowing the compensation, carrier full reimbursement of all sums paid to DONNIE LEBLANC despite its prior waiver of subrogation in favor of ARCO. The Court further reversed the award of attorneys fees made by the District Court on the basis of this Honorable Court's ruling in *Bloomer v. Liberty Mutual Ins. Co.*, 100 S. Ct. 925 (1980). An application for rehearing en banc ensued and was denied by the Fifth Circuit on August 7, 1981.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted because this case involves important issues of federal law which have not been previously decided by this Court. Specifically, the issue presented is whether or not an insurer which has paid benefits to an injured employee under the Longshoremen and Harbor Workers' Compensation Act (LHWCH) may fully recover these benefits out of the proceeds of a settlement made by the injured employee and a negligent third party where the insurer has previously waived its rights of subrogation in favor of the negligent third party. This Court has not yet had occasion to render a decision on this issue which involves fundamental rights of both an injured employee and the employer/insurer under

the LHWCA. Thus, an authoritative ruling on this point should be made by this Court.

Under the express provisions of Section 33 (h) of the LHWCA, 33 U.S.C. 933 (h), a compensation insurer is subrogated to all rights granted the employer under Section 33 of the Act:

> Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

These rights include the assignment of an injured employee's claim against a third party causing his injury where the employee has received payments pursuant to a compensation award:

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award. 33 U.S.C. 933 (b).

Where there has been no formal award of compensation, the Act contains no express provision allowing for the subrogation of the employee's rights

against third parties to the employer or its compensation insurer. However, where the injured employee himself institutes an action against a third party, the Courts have long recognized the right of the employer, or its insurer, to subrogation to the full extent of payments made to an injured employee, or its without formal award. *The Etna*, 138 F. 2d 37 (C.A. 3rd Cir., 1943); *Hugev v. Dampskisaktieselskabet* International, 170 F. Supp. 601 (S. D. Cal. 1959), aff'd sub nom. Metropolitan *Stevedore Co. v. Dampskisaktieselskabet* International, 274 F. 2d 875 (9th Cir.), cert. denied, 363 U.S. 803, 80 S. Ct. 1237, 4 L. Ed. 2d 1147 (1960); *Fontana v. Pennsylvania R.R.*, 106 F. Supp. 461 (S.D.N.Y. 1952), aff'd sub nom. *Fontana v. Grace Line, Inc.*, 205 F. 2d 151 (2d Cir.), cert. denied, 346 U.S. 886, 74 S. Ct. 137, 98 L.Ed. 390 (1953). These decisions recognize that the underlying basis of the so called "compensation lien" against a recovery from a third party is the employer's right to subrogation.

In *Allen v. Texaco*, 510 F. 2d 977 (C.A. 5th Cir. 1975), the Fifth Circuit Court of Appeals was faced with the question of the effect of a waiver of this right of subrogation in favor of a third party on the compensation insurer's claim for benefits it had paid an employee injured through the negligence of that third party. The Court in *Allen* noted the true nature of the compensation lien, stating:

> "The Court in establishing a compensation lien against the recovery fund does so only in terms of the employer's right to subrogation for compensation payments made to the employee. . .There is no indication that any independent right, i.e., other than a right of subrogation, was created in favor of the employer or its insurer."

Recognizing that the only right to reimbursement enjoyed by the employer-insurer was predicated on the right of subrogation, the Court found the insurer's waiver of that right had likewise waived its claim to reimbursement for the recovery made by the employee:

> "North-West argued that it waived only its right to subrogation and not its right to lien on the plaintiff's recovery fund. It is fundamental, that a lien does not exist without a right or obligation to support it. A lien is simply a claim against property for the payment of a debt or the fulfillment of some obligation. . .when North-West waived subrogation, it necessarily waived the lien which it claims to assert bottomed on the right of subrogaton." 519 F.2d at Page 981.

Thus, the Fifth Circuit held in *Allen v. Texaco* that where a compensation insurer had previously waived its right to subrogation against a third party, the insurer would then be precluded from later asserting a right to a compensation lien against the settlement proceeds received by an injured employee from the same third party. As the lien was premised on a

right of subrogation, the waiver of the right of subrogation also waived any claim to the settlement between the third party and the injured employee. *Allen v. Texaco, Inc.*, supra, at page 978.

The *Allen* Court also dealt with the troublesome question of double recovery by the employee (a point upon which this Court recently expressed some concern, though in a somewhat different context, in *Bloomer v. Liberty Mutual Ins. Co.*, 100 S.Ct. 925 (1980), under circumstances wherein the employer-insurer is not permitted reimbursement because of a prior waiver of subrogation. The Court noted:

> "In circumstances where no waiver has been given the possibility of double recovery by the plaintiff provides justification for creating an equitable lien in favor of a party making compensation payments to the injured workman. But if the right to subrogation has been waived, there is no debt for which an equitable lien can be created. Having waived its right to subrogation, North-West has no standing to protest the plaintiff's possible double recovery." 510 F.2d at Page 982.

The resulting double recovery by the employee, in a situation such as *Allen*, does no dis-service to the LHWCA as the only right which the employer-insurer has insofar as reimbursement is concerned is the right of subrogation which it has waived.

While the instant case presents a somewhat different factual setting the principles enunciated in *Allen v. Texaco* are an essential element in the resolution of this controversey.

In view of the waiver of subrogation made by American Home in favor of ARCO, *Allen v. Texaco* and *Capps v. Humble Oil & Refining Co.* would seem to clearly preclude appellant from asserting its right to a compensation lien on the proceeds of the settlement were ARCO the only defendant in this case. However, this case is complicated by the fact that ARCO was only one of three remaining defendants in the third party action. It would appear that the effect of a waiver of subrogation by one of multiple defendants is an issue which has not been previously determined by this Court. There being no Federal Law on this point, resort must be had to the law of the State of Louisiana, applied as surrogate Federal Law. *Rodrigue v. Aetna Casualty & Surety Co.*, 89 S.Ct. 1835 (1969); *Gaudet v. Exxon Corp.*, 562 F. 2d 351 (5th Cir., 1977); *Aymond v. Texaco, Inc.*, 554 F. 2d 206 (5th Cir., 1977).

Louisiana law provides that when several persons are obligated in such a way that each one is separately bound to perform the whole of an obligation, the persons are said to be obligated "in solido" and are called solidary obligors. LSA-C.C. Art. 2082.

Solidary obligation may arise by contract or by tort. *Granger v. General Motors Corp.*, 171 So.2d 720 (La. App. 3rd Cir., 1965). Where the combined negligence or fault of two or more persons contributes to and brings about an accident, they are deemed joint tortfeasors under Louisiana law and are liable in solido to the injured party. *Lowenburg v. Labor Pool of America, Inc.*, 296 So. 2d 846 (La. App. 4th Cir., 1974); writ denied 300 So. 2d 820 (La. App. 2nd Cir., 1971).

The pertinent Louisiana legislation dealing with the relationship between solidary obligors insofar as the release of one or more of them is concerned in Louisiana Civil Code Article 2203 which provides as follows:

> "The remission or conventional discharge in favor of one of the co-debtors in solido, discharges all the others, unless the creditor has expressly reserved his right against the latter.
>
> In the latter case, he cannot claim the debt without making a deduction of the part of him to whom he has made the remission."

Louisiana Courts have applied this article to situations involving joint tortfeasors, holding that the release of one joint tortfeasor, without an express reservation of rights against other solidary obligors, operates to discharge all of the joint tortfeasors from

liability. *Hemphill v. Strain*, 341 So. 2d 1186 (La. App. 1st Cir., 1976); *Clay v. State Farm Mutual Automobile Insurance Co.*, 337 So. 2d 380 (La. App. 3rd Cir. 1976); *Burger v. Firemen's Fund Insurance Co.*, 305 So. 2d 724 (La. App. 4th Cir., 1974). The Courts have further held that even where an express reservation of rights is made following the release of a solidary obligor, the remaining solidary obligors are entitled to a pro rata reduction in the amount owed equal to the proportionate share of the released solidary obligor. *Danks v. Maher*, 177 So. 2d 412 (La. App. 4th Cir., 1965).

In the instant case it was alleged that the injury sustained by Donnie LeBlanc was the result of the joint and concurring negligence or fault of all defendants. The stipulated judgment resulting from the settlement agreement in this case found the three defendants, ARCO, Petco and B.J. Hughes, Inc. to be solidarily liable for the damages sustained by plaintiff. Accordingly, the three defendants are, under Louisiana law, solidary obligors. The waiver of subrogation in favor of ARCO by American Home prevented the comp carrier from later seeking to recover any of the benefits which it had paid to the plaintiff from ARCO. In effect, this waiver of subrogation was a release of ARCO, one of three solidary obligors. As has been noted above, the

release of one solidary obligor requires a pro rata reduction in the amount owed by the remaining solidary obligors. *Danks v. Maher,* supra. This was the result reached by the District Court as it deducted one-third (⅓) of respondent's claim for reimbursement before making an award to it of the balance. It is submitted that under the facts of this case this result was correct.

CONCLUSION

This petition calls upon this Honorable Court for an authoritative determination of the issues presented herein. It is respectfully submitted that certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has this date been forwarded to Mr. Colvin G. Norwood, Jr., Lafayette Place, Camp and Capdevielle Streets, Post Office Box 2000, New Orleans, Louisiana 70176, by placing same in the United States mail postage prepaid and properly addressed.

Abbeville, Louisiana this 5TH day of October, 1981.

Charles M. Thompson

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION
NUMBER 76-0536
Filed Feb. 20, 1980

DONNIE LEBLANC

versus

PETROLEUM EQUIPMENT TOOLS COMPANY

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For Intervenor: McGlinchey, Stafford, Mintz
& Hoffman, C. G. Norwood, Jr.,
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New Orleans, Louisiana 70139

R. J. PUTNAM, SENIOR JUDGE

MEMORANDUM OPINION

Plaintiff, Donnie LeBlanc, brought suit against Atlantic Richfield Company (ARCO), Petroleum Equipment and Tools Company (PETCO), and B.J. Hughes (Hughes) for a hand injury he sustained while working on a fixed platform in the Gulf of Mexico off the Louisiana Coast. The injury occurred while he was operating a set of power tongs on a drilling platform on the outer continental shelf. Hughes manufactured the tongs; PETCO owned them and leased them to ARCO, the owner of the platform. Plaintiff's employer, Atlantic Pacific Marine Corporation (Atlantic Pacific), had contracted to drill one or more wells in search of oil and other minerals for the platform in question.[1]

Plaintiff received compensation benefits from Atlantic Pacific's insurer, American Home Assurance Company (American Home), in the amount of $18,615.88, under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. American Home intervened to recover benefits paid by it pursuant to 33 U.S.C. §933. Plaintiff has now settled with ARCO, PETCO, and Hughes for

1. The original parties to the contract were ARCO and Walker-Huthance Offshore Company. Walker-Huthance assigned this contract to Atlantic Pacific, which assumed all obligations under the contract with ARCO.

$50,000.00 with each defendant contributing one-third. Left to be decided is the amount, if any, that intervenor is entitled to receive out of the proceeds of the settlement.

The dispute between the plaintiff and intervenor stems from the agreement between Atlantic Pacific and ARCO.[2] Under the terms of the contract, Atlantic Pacific was to secure a waiver of subrogation in favor of ARCO in all policies of insurance carried by it, as to any acts or omissions in connection with the work covered by the contract. The following endorsement was obtained from American Home to effect this purpose:

> "The company, in the event of payment under this policy, waives its rights of subrogation against any individual, firm or corporation for whom the Named Insured may be working, but this waiver shall apply only in respect to the specific contract existing, between the Named Insured and such other individual, firm or corporation and shall not be construed to be a waiver in respect of other operations of such individual, firm or corporation in which the insured has no contractual interest."

Plaintiff LeBlanc contends that this waiver as

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2. This contract is not in the record. It is not needed for the determination of this case, since the issue to be decided arises from the insurance contract between Atlantic Pacific and American Home, which is in evidence.

to ARCO also waives intervenor's right of subrogation as to PETCO and Hughes, or at least has the effect of reducing intervenor's claim by one-third.

Plaintiff relies on *Allen v. Texaco*, 510 F. 2d 977 (5 Cir. 1975) and Louisiana Civil Code Article 2203,[3] applied here as surogate federal law, *Rodrigue v. Aetna Casualty & Surety Co.*, 89 S. Ct. 1835 (1969), in support of his position. The argument is that, under *Allen*, the waiver of subrogation does not contain a reservation of rights against the other defendants; therefore, Article 2203 operates to discharge the remaining debtors in solido, so that they owe nothing to American Home under 33 U.S.C.A. §933.

In *Allen v. Texaco*, supra, the Fifth Circuit held that the equitable lien given to the compensation carrier on the proceeds of any settlement by an injured longshoreman with a third party tort feasor, is based on the right of subrogation granted by 33 U.S.C. § 933(h) and does not exist without it. Thus, when a

3. Louisiana Civil Code Article 2203 reads:
"The remission or conventional discharge in favor of one of the co-debtors insolido, discharges all the others, unless the creditor has expressly reserved his right against the latter.
In the latter case, he cannot claim the debt without making a deduction of the part of him to whom he has made the remission."
The briefs assume the defendants to be joint tort feasors and liable *in solido*. This is not admitted, and our Opinion is limited to this hypothesis.

compensation carrier waives its right of subrogation against a third party the carrier's lien on the plaintiff's recovery from that third party is also waived. *Allen* dictates here that American Home has waived its right of subrogation as to defendant ARCO and therefore cannot claim a lien on the proceeds of the settlement paid by that company.

Article 2203 of the Louisiana Civil Code of 1870 does not prohibit American Home's recovery against the proceeds paid by PETCO and Hughes, however. This code article requires that when a creditor releases one debtor *in solido*, the creditor must reserve its rights against the remaining co-debtors *in solido*, or they are also released. They are each bound for the whole of the debt and are representatives of each other in their dealings with the creditor in regard to the common debt. Only one obligation exists in favor of the creditor, and if any one of the co-debtors negotiates a settlement or payment of the debt, it insures to the benefit of the others. If the creditor wishes to release one co-debtor without discharging the others, he must make this intention known by reserving his rights against the others, making it clear that his release of one debtor is restricted to that particular person and does not extend to the others.[4]

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4. Article 2203, supra; see also Aubry & Rau, Droit Civil Law Translations § 298(b), at pp. 30. 31 & 32.

The instant case does not fall within the scheme of Article 2203, supra. The solidary obligation here arises out of the defendants' relationship as joint tort feasors, a relationship that could not have existed prior to the tort. The waiver by American Home was executed before the injury to LeBlanc. At that time, no solidary debt and no mandatory relationship existed among the defendants and American Home had no one against whom it could have reserved any rights. While ARCO may have been found to be a joint tort feasor as to plain and liable *in solido* for the whole debt because of the pretort waiver of subrogation, it has no obligation to reimburse American Home. As between it and the remaining tort feasers (assuming they are such), however, ARCO is still liable for its one third of the total debt. If we allow full recovery of the amount of benefits paid to plaintiff from PETCO and Hughes, we would permit American Home to do indirectly what it cannot do directly, for the obligation of ARCO to respond for its virile share of the debt is not affected by its contract with plaintiff's employer, Atlantic Pacific and its insurer.

But we cannot now decide this case. In our study of the record, the lease of the offending power tongs by PETCO requires ARCO to indemnify and hold it harmless from any liability resulting from the

use of the tongs. No mention of this contract is made in the briefs or in the stipulation submitting the matter. The lease was filed on October 30, 1979, in response to plaintiff's request for production of documents. Moreover, *Mitchell v. Schiepvaart, etc.*, 579 F. 2d 1274, (5 Cir. 1978) unequivocally requires that plaintiff's claim for attorney's fees be further documented on a quantum meruit basis.

For the foregoing reasons, we have requested and now order that both sides submit briefs within ten (10) days of this date on the following questions:

1. Does the indemnity agreement between ARCO and PETCO fall within the waiver of subrogation in the American Home policy issued in this case, so as to deny recovery by American of any reimbursement of payments for the settlement between PETCO and plaintiff LeBlanc?

2. Attorneys fees due plaintiff's attorney, if any, from the recovery of benefits by American Home.

In connection with paragraph 2 next above, the parties may be able to stipulate on attorneys fees or submit the question on affidavits of plaintiff's counsel.

IT IS SO ORDERED.

SUPPLEMENTAL OPINION

Having received the additional briefing and affidavits required by our Order of February 14, 1980, we proceed to the final disposition of the claims presented by American Home's intervention for compensation benefits previously paid to plaintiff, totaling $18,615.88.

Under *Allen v. Texaco*, 510 F 2d 977 (5 Cir. 1977), having waived subrogation against Atlantic Richfield Company (ARCO), American Home Assurance Company has lost its lien on the proceeds of any settlement paid by that company, which reduces the intervention by one-third. After considering the briefs, we conclude that the indemnity agreement between ARCO and Petroleum Equipment and Tools Company (PETCO) has no effect on intervenor's claim to the one-third of the settlement paid by PETCO. The agreement does change the relationship between the co-debtors ARCO and PETCO, but it has no effect on the creditors' rights against them as soldairy obligors in the absence of an express agreement or condition attached to the obligation. Cf. *Maryland Casualty Company v. Liberty Mutual Insurance Co.*, 224 So. 2d 465 (La. 1969). American Home is entitled to recover two-thirds of its intervention, $12,410.59,

and no more.

A second issue left undecided by the previous opinion is that of attorney's fees. In cases such as this, where the compensation carrier simply intervenes in the plaintiff's suit against a third party tortfeasor, the plaintiff's attorney may be awarded attorney's fees out of the intervenor's recovery on a quantum merit basis. We requested further documentation from the plaintiff's attorney upon which an award of attorney's fees could be based. An affidavit by the attorney has been filed.

The Fifth Circuit, in *Mitchell v. Scheepvaart Maatschappij Trans Ocean*, 579 F. 2d 1275 (5 Cir. 1978), established the method by which attorney's fees, if any, are to be determined here. *Mitchell* provides that the calculation cannot be reduced to a formula, but offers a three-step method to be followed:

> "It must be done by (a) fixing a total fee that would be reasonable under the circumstances of the case; (b) determining the amount of the fee that plaintiff's council is entitled to receive from his client, taking into account the court's responsibility to supervise the reasonableness of any contingency fee; and, (c) determining to what extent the difference between a reasonable fee for the gross recovery and the attorney's fee paid by the plaintiff may justly be taxed against the compensation carrier." 579 F. 2d, at 1281.

Applying this approach, the court finds as follows:

(a) A one-third contingency fee is reasonable in this case. A reasonable fee on the $50,000 settlement would, therefore, be $16,666.66.

(b) Plaintiff's net recovery after subtracting the intervention of $12,410.59, is $37,589.41. Plaintiff's attorney is entitled, by contract, to one-third or $12,529.80.

(c) The difference between the one-third contingency fee on the gross amount and plaintiff's net recovery is $4,136.86, the equivalent of one-third of the intervenor's recovery.

The plaintiff's attorney's affidavit states that he alone prepared the case for trial, receiving no assistance from the intervenor's attorney. Plaintiff's attorney also states that he has spent "hundreds of man hours in preparation of this case for trial," and was required to depose various witnesses. These assertions by the attorney are not of the specificity needed to precisely calculate the value of his services, but the court feels, after considering the time and labor required for this type of case, the customary fee

charged, the amount of the settlement, and the experience, reputation, and ability of the attorneys*, along with the fact that the plaintiff's attorney received little assistance from the intervenor, that a fee of $4,136.86, assessed against American Home, is reasonable.

The allocation of the proceeds from the settlement, rounded off, shall be made as follows:

Plaintiff	$25,059.61
American Home	8,273.73
Plaintiff's Attorney	16,666.66

The attorney representing plaintiff shall forthwith prepare and forward a formal decree for signature by the court in keeping herewith. Judgment is rendered accordingly. The Clerk shall delay entry of judgment until such time as the formal decree is signed and filed.

Lafayette, Louisiana, May 8, 1980.

/S/ Illegible

United States Senior District Judge

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* These factors are set forth in footnote 10 of *Mitchell*, supra, as factors to be considered in determining appropriate attorney's fees.

B-1

Donnie A. LeBLANC,
Plaintiff-Appellee,

v.

PETCO, INC., et al., Defendants,

v.

AMERICAN HOME ASSURANCE COMPANY,
Intervenor-Appellant.

No. 80-3468

United States Court of Appeals,
Fifth Circuit
Unit A

June 12, 1981.

Compensation carrier intervened in injured longshoremen's suit against three third-party tort-feasors. The United States District Court for the Western District of Louisiana, Richard J. Putnam, J., rendered judgment for the carrier in an amount less than its compensation lien and carrier appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) no reduction in the compensation lien was to be made for

the fees charged by the injured longshoremen's attorney, and (2) the compensation lien was not subject to reduction by one-third because the carrier waived its right of subrogation against one of the three joint tort-feasors.

Reversed and remanded.

Spears, District Judge, Western District of Texas, sitting by designation, filed a dissenting opinion.

1. Workers' Compensation 2251

Recovery of compensation carrier from third-party tort-feasors was not subject to reduction because of injured longshoremen's attorney's fee. Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. §901 et seq.

2. Workers' Compensation 2252

Compensation carrier's lien on amount recovered by injured employee from three third-party tort-feasors was not subject to reduction by one-third because of carrier's contractual waiver of any right of subrogation against one of those parties. LSA—C.C. art. 2203.

Appeal from the United States District Court for the Western District of Louisiana.

Before CHARLES CLARK and GEE, Circuit Judges, and SPEARS,* District Judge.

GEE, Circuit Judge:

Atlantic Pacific Marine Corporation ("Atlantic Pacific") contracted to drill an oil well for Atlantic Richfield Company ("ARCO") on the outer continental shelf off the Louisiana coast.[1] The Atlantic Pacific/ARCO contract required Atlantic Pacific to secure in all insurance policies obtained by it with respect to the contract a waiver of any right of subrogation the insurer would otherwise have against ARCO. Atlantic Pacific secured its Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., coverage from the appellant, American Home Assurance Company ("American Home"); the policy contained the required waiver of American

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*District Judge of the Western District of Texas, sitting by designation.

1. The original parties to the contract were ARCO and Walker-Huthance Offshore Co. Walker-Huthance assigned this contract to Atlantic Pacific, which assumed all obligations under the contract with ARCO.

Home's right of subrogation against ARCO.

Appellee, Donnie A. LeBlanc, an employee of Atlantic Pacific, was injured while working with a set of rotary tongs on a fixed platform owned by ARCO. American Home paid to or for the benefit of LeBlanc a total of $18,615.86 in compensation benefits and medical expense payments. LeBlanc filed suit against numerous defendants, including ARCO, Petco, Inc. ("Petco"), the supplier of the tongs, and B. J. Hughes, Inc. ("Hughes"), the manufacturer of the tongs. American Home intervened, asserting its compensation lien for the $18,615.86 it had paid LeBlanc. Prior to trial LeBlanc settled with ARCO, Hughes, and Petco for $50,000. The settlement stipulated that these three defendants were jointly liable to LeBlanc; under its terms each has paid LeBlanc one-third of the $50,000. Because LeBlanc and American Home were unable to agree on the amount of reimbursement due the insurer, the settlement further provided that any recovery subsequently secured by American Home would be paid by LeBlanc.

American Home and LeBlanc then proceeded to trial, the insurer claiming a right to reimbursement for the full $18,615.86 it had paid to or for the benefit of LeBlanc. The district court first reduced the amount claimed by one-third because American Home had waived its right of subrogation against ARCO,

one of the three joint obligors. The trial court then reduced American Home's claim for the remaining $12,410.59 by one-third of that figure and awarded that amount, $4,136.86, to LeBlanc's attorney in partial payment of his fee. American Home appeals. Finding that the trial court erred in making either reduction we reverse and direct that judgment be rendered in favor of American Home for the full amount of its compensation lien.

[1] As for the attorney's fee issue, the trial court, properly relying on our decision in *Mitchell v. Scheepvaart*, 579 F.2d 1274 (5th Cir. 1978), stated that "where the compensation carrier simply intervenes in the plaintiff's suit against a third party tortfeasor, the plaintiff's attorney may be awarded attorney's fees out of the intervenor's recovery on a quantum meruit basis." Subsequent to the trial court's decision, the United States Supreme Court held in *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 100 S. Ct. 925, 63 L.Ed.2d 215 (1980), that under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., no such reduction in the compensation lien is to be made. Accordingly, the trial court erred in reducing American Home's compensation lien for a portion of LeBlanc's attorney's fees.

[2] The trial court's holding that American

Home's compensation lien should be reduced by one-third because the insurer waived its right of subrogation against ARCO, one of the three joint obligors, is attacked by American Home on the ground that without regard to its right to the proceeds paid LeBlanc by ARCO, it is entitled to full reimbursement of the $18,615.86 from the $33,333.33 paid to LeBlanc by Petco and Hughes. American Home argues, and counsel for LeBlanc conceded at oral argument, that if LeBlanc had sued only Petco and Hughes and had recovered more than $18,615.86 from them American Home would have been entitled to full reimbursement. According to American Home, LeBlanc's decision to join ARCO as a defendant and his recovery of additional damages from ARCO can have no effect on American Home's rights in the proceeds received by LeBlanc from Petco and Hughes. We can only agree.

LeBlanc attempts to avoid this result by relying on the rule of Louisiana law that the release of one solidary obligor with an express reservation of rights against the others requires a pro rata reduction in the amount owed by the remaining solidary obligors.

La.Civ.Code art. 2203.[2] The contention is that ARCO, Petco, and Hughes are solidary obligors; that a waiver of a right of subrogation is equivalent to a release; and thus that American Home's recovery must be reduced by one-third. If American Home's waiver of its right of subrogation against ARCO were the equivalent of a release, LeBlanc's argument might have merit. Since, however, the waiver in this case cannot be equated with release, we reject the argument.

In Louisiana, but for article 2203 a release would adversely affect the remaining solidary obligors. Their right to contribution from the released tortfeasor would be defeated by the release because their right to contribution exists solely as a result of their being subrogated to the rights of the creditor against other solidary obligors; where one solidary obligor is released, the creditor has no rights against

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2. American Home argues that the Supreme Court's decision in *Bloomer v. Liberty Mut. Ins Co., supra*, makes clear that federal law "demands that the employer/carrier be reimbursed out of the proceeds of any settlement of judgment obtained by the injured employee against a third party." To the extent that Louisiana law dictates a different result, American Home, citing *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.ED.2d 360 (1969), contends it is inconsistent with federal law and thus cannot be applied. In light of our view that art. 2203 is not inconsistent with American Home's reading of *Bloomer* on the facts presented by this case, we need not determine what result would be reached if Louisiana law did call for a reduction in the compensation lien.

him to which the remaining obligors may be subrogated. Thus, the remaining obligors would be left without a right of contribution against the released obligor. *See Danks v. Maher,* 177 So.2d 412 (La.Ct.App.1965). In contrast, American Home's waiver of its right of subrogation against ARCO had no effect whatever on the relative liabilities of ARCO, Petco, and Hughes to LeBlanc; these defendants have already made equal one-third payments in satisfaction of the $50,000 setlement made with LeBlanc, and the outcome of this suit will have no effect on them. Accordingly, we decline to treat the waiver of subrogation in this case as a release under article 2203.[3]

The judgment of the district court is REVERSED and the case REMANDED for further proceedings consistent with this opinion.

REVERSED and REMANDED.

SPEARS, District Judge, Dissenting:

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3. We do not imply that a waiver of a right of subrogation can never be treated as a release under art. 2203. If LeBlanc had not sued ARCO, Petco, and Hughes, American Home would have been subrogated to his rights against them. 33 U.S.C. § 933(b), (f). Suit by American Home against ARCO, however, presumably would have been precluded by the waiver of its right of subrogation against ARCO. We leave for another day the question of whether American Home's recovery against Petco and Hughes would have been reduced by one-third. *See* n.2, *supra.*

I agree, of course, that the decision of the district court on the question of attorney's fees awarded to LeBlanc's counsel must be reversed. However, I would affirm the trial court's action in deducting one-third (⅓) of American Home's claim for reimbursement before awarding it the balance, and to that extent I respectfully dissent.

The majority has chosen to ignore a substantial part of the pertinent case law, and make its decision on the basis of a "contrast" between the rights of solidary obligors, "but for" Article 2203,[1] and the effect of American Home's waiver of its right of subrogation on the relative liabilities of ARCO, Petco and Hughes to LeBlanc. Thus, by erroneously adjudicating this controversy as of the time the proceeds of the settlement came into LeBlanc's hands, rather than pursuant to the legal rights of LeBlanc and American Home, as plaintiff and intervenor, separate and apart from the settlement itself, the majority would circumvent the rights of LeBlanc, and

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1. La.Civ.Code, Art. 2203 provides:

> "The remission or conventional discharge in favor of one of the co-debtors *in solido*, discharges all the others, unless the creditor has expressly reserved his rights against the latter.
>
> "In the latter case, he cannot claim the debt without making a deduction of the part to him to whom he has made the remission."

permit American Home to recover the entire amount of its claim (a situation that could not have existed if a trial to judgment had taken place) and thereby do indirectly what it could not have done directly.

Aside, therefore, from the questionable nature of the premises utilized by the majority in its "contrast" syllogism, is the simple fact that American Home's rights are derivative of the employee's cause of action. In order to assert its compensation lien, American Home exercised its right to intervene in this lawsuit. If LeBlanc had received nothing, there would have been no reimbursement whatever to American Home. As it is, since ARCO, together with Petco and Hughes, the other two solidary obligors, were all parties to the suit, the law requires that any recovery by American Home would have to be reduced by one-third.

The Courts have long recognized an independent right of subrogation in favor of employers and their carriers who voluntarily pay compensation to an injured employee without a formal award. *The Etna*, 138 F.2d 37 (3rd Cir. 1943); *Allen v. Texaco, Inc.*, 510 F.2d 977 (5th Cir. 1975). However, as above indicated, this right of subrogation is deemed to be wholly derivative of the employee's right of action against third parties. The employer-carrier's rights are prop-

erly asserted through intervention in the employee's suit for the purpose of placing a lien on the recovery for compensation benefits previously paid. In *Allen* this Court held that a waiver of subrogation rights by a compensation carrier barred a lien against and participation in the proceeds of a settlement between the injured employee and the third party tortfeasor. "*It is fundamental*", noted the Court, "*that a lien does not exist without a right or obligation to support it*". (Emphasis added. *Id.* at 981.

As in *Allen, the only right which American* Home had to the proceeds of the settlement with the third party tortfeasors was the right of subrogation to which it succeeded as insurer. Consequently, when American Home waived its right of subrogation against ARCO, it necessarily waived the lien which it claims to assert to the proceeds paid into the recovery fund by ARCO. *See, e.g., Petro-Weld v. Luke,* 619 F.2d 418, 421 (5th Cir. 1980) (although the waiver precluded reimbursement for the benefits already paid, it did not prevent future compensation benefits determined according to the statutory set-off); *Capps v. Humble Oil & Refining Co.,* 536 F.2d 80, 81-82 (5th Cir. 1976) (carrier which had agreed to waive its rights of subrogation could not avoid the consequences of its agreement, because it had no other rights independent of the right of subrogation for

reimbursement); *Stewart v. Cran-Vela Rental Co.*, 510 F.2d 982, 984-985 (5th Cir. 1975)(waiver of subrogation by a carrier precludes the carrier from asserting a compensation lien against recovery by employee in a suit against third party tortfeasor).

The effect of the trial court's ruling here was to treat the waiver as a release of ARCO, one of the three solidary obligors, and require a pro rata reduction in the amount owed by the remaining obligors, without requiring the employee to make up the difference. *See Danks v. Maher,*177 So.2d 412 (La.App. 4th Cir. 1965); La.Civ.Code, Art. 2203.

The majority postulates that if LeBlanc had sued only Petco and Hughes, and had received more than the amount claimed by American Home from them, American Home would have been entitled to full reimbursement. This necessarily presupposes that Petco and Hughes were the only solidary obligors; however, the fact remains that there were three—not two—solidary obligors. Under Louisiana law, when the combined negligence of two or more parties contributes to and results in an injury, they are deemed joint tortfeasors, and are liable *in solido* to the injured party. *Lowenburg v. Labor Pool of America*, 296 So.2d 846 (La.App.) *writ denied*, 300 So.2d 891 (La.1974). So, even if LeBlanc had sued only Petco

and Hughes, it is a virtual certainty that ARCO would have been impleaded under Rule 14, F.R.Civ.P., or joined as a party under Rule 19, F.R.Civ.P., and if the case had proceeded to judgment against all three, Article 2203, in either situation, would have limited American Home as Intervenor, to only two-thirds of the total amount it sought.

At no time did ARCO voluntarily relinquish its right to the waiver of subrogation by American Home. Even when the settlement agreement was reached, the amount American Home was entitled to receive was left for resolution by the court. However, the majority appears to believe that the settlement has somehow resurrected and breathed new life into a lien that had ceased to exist, and changed the relative rights of the parties to the extent that the carrier would be entitled to reimbursement in full for the compensation it paid, whereas, the injured employee would have to pay out of his pocket that which the carrier had specifically agreed to forego. With this I cannot agree.

C-1

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-3468

Filed Aug. 7, 1981

DONNIE LEBLANC,
Plaintiff-Appellee,

versus

PETRO, INC., ET AL.,
Defendants,

versus

AMERICAN HOME ASSURANCE CO.,
Intervenor-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

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C-2

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 06-12-81, 5 Cir., 1981,_____F.2d._____)

(August 7, 1981)

ORDER:

(✓) The judges in regular active service of this Administrative Unit having been polled at the request of a judge who was member of the panel and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs Gee

United States Circuit Judge

Opposition

NO. 81-682

Office - Supreme Court, U.S.
FILED
NOV 6 1981
ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1981

DONNIE A. LEBLANC
Plaintiff-Appellant

versus

PETCO, INC., ET AL
Defendants
versus

AMERICAN ASSURANCE COMPANY
Intervenor-Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeal correctly concluded that a waiver of subrogation does not constitute the release of a joint tortfeasor, as a matter of Louisiana law, under the facts existing in this case.

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In the
Supreme Court of the United States
OCTOBER TERM, 1981
NO. 81-682

DONNIE A. LEBLANC
Petitioner

versus

PETCO, INC., ET AL

versus

AMERICAN ASSURANCE COMPANY
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

American Home Assurance Company, respondent, respectfully prays that the petition for writ of certiorari requested by petitioner, Donnie A. LeBlanc, be denied.

STATEMENT OF THE CASE

Respondent adopts and accepts the description

of the facts as set forth in petitioner's brief, with the following qualification. The settlement between petitioner and defendants provided that petitioner would have the responsibility for satisfying the lien of respondent. The sole question presented to the District Court was the viability of respondent's lien upon the funds in petitioner's hands.

SUMMARY OF ARGUMENT

The facts in the present case reflect that three defendants funded a settlement with plaintiff, an employee covered under the Longshoremen's and Harbor Workers' Compensation Act. Each defendant contributed one third of the total settlement and petitioner agreed to be responsible for the compensation lien of his employer's carrier. In litigating the lien, petitioner asserted that the waiver of subrogation in favor of one of the three settling defendants by respondent was tantamount to the release of a joint tortfeasor under Louisiana law; thus, compelling a pro rata (⅓) reduction of the lien. The Fifth Circuit Court of Appeal correctly held that the waiver of subrogation did not operate as a release because the party in whose favor it operated contributed an equal share to the settlement. There being no release, established case law mandates full recovery of respondent's lien. Since the present case raises no issue of a magnitude

required by the Rules of this Honorable Court, the petition for writ of certiorari should be denied.

ARGUMENT

This case presents the issue of whether a waiver of subrogation, by the insurer of a longshoreman's employer, has any effect upon the insurer's rights to pursue third-party tortfeasors other than the party in whose favor the waiver operates. The facts, as outlined above, reflect that three defendants, ARCO, PETCO, and Hughes, funded a settlement with petitioner, with the express proviso that the plaintiff satisfy respondent's lien. The contributions of the two defendants not named in the waiver totaled in excess of the lien asserted by respondent.

As noted in the Opinion published by the Fifth Circuit Court of Appeal[1], counsel for petitioner has stipulated that 100% of the lien would have been recoverable if LeBlanc had sued only PETCO and Hughes. On this basis, the Court concluded that the mere fortuity that ARCO was named as a defendant, and contributed to the settlement, would have no effect upon respondent's lien. *Id.* The Court then proceeded to consider whether petitioner's having named ARCO as a defendant, and ARCO's contribution to

1. *LeBlanc v. PETCO*, 647 F. 2d 617 (5th Cir. 1981).

settlement, could have any effect upon respondent's lien. As demonstrated below, the Fifth Circuit resolved this issue based upon Louisiana law. Since Louisiana law on this point is dispositive, and not in conflict with Federal law, there is no basis upon which the writ of certiorari should issue.

The right of the employer to claim subrogation against the proceeds of its employee's third party claim is well documented in the case law. See, for example, *The Etna*, 138 F.2d 37 (3rd Cir. 1943); *Davillier v. Cavn Venezuelan Line*, 407 F. Supp. 1234 (E.D. La. 1976); *Allen v. Texaco, Inc.*, 510 F. 2d 977 (5th Cir. 1975). The employer's (or employer's carrier's) right to proceeds is absolute and must be satisfied before the employee reaps any benefits from his third-party action. *Bloomer v. Liberty Mutual Insurance Company*, 445 U.S. 74, 63 L.Ed. 2d 215, 100 S. Ct. 925 (1980); *Albert v. Paulo*, 552 F. 2d 1139 (5th Cir. 1977).

An exception to the employer's right to seek recovery of its lien has been judicially recogized where there exists a waiver of subrogation in favor of the third-party tortfeasor. *Allen v. Texaco, supra.* In Allen, the third party settled with the plaintiff and reserved for trial the issue of the employer's carrier's lien. The Fifth Circuit held that the employer's carrier had contracted away its right to pursue subrogation

against Texaco and dismissed the intervention. *Id.*

In the present case, there was no waiver by respondent in favor of PETCO and Hughes. Petitioner, however, argues that the waiver of subrogation in favor of ARCO is tantamount to a release, thereby prejudicing the rights of PETCO and Hughes to seek contribution. Under Louisiana Law, the argument continues, the release of one joint tortfeasor (ARCO) to the prejudice of other joint tortfeasors (PETCO and Hughes) compels a pro rata reduction of the amount of respondent's lien.[2]

Petitioner's argument has no merit in the present case because the waiver of subrogation can not be equated with a release.[3] The consent judgment signed by the District Judge reflects that ARCO, PETCO, and Hughes stipulated joint liability and each paid its respective ⅓ of the total settlement. Under the terms of the settlement, the contributing defendants were given complete releases and petitioner agreed to be

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2. Under Louisiana law, the release of a joint tortfeasor serves to reduce, pro rata, the liability of the remaining defendants. LSA-CC Art. 2203; *Danks v. Maher,* 177 So.2d 412 (La. App. 4th Cir. 1965). The pro rata reduction is allowed because, by settling, the plaintiff has precluded the remaining defendants from seeking contribution.

3. See opinion of Court below at 647 F. 2d 617, 619, reproduced in petitioner's brief at B-7, 8.

responsible for satisfying respondent's lien. Since ARCO paid ⅓ of the total judgment, the Court concluded that ARCO had not been released. Having concluded that no release of a joint tortfeasor had taken place, the Court held that LSA-CC Art. 2203 had no effect.

Even if the waiver could be equated with a release of a joint tortfeasor, petitioner's reliance upon Louisiana law would be inappropriate under the circumstances. Specifically, U.S. law demands that the employer/carrier be reimbursed out of the proceeds of any judgment or settlement obtained by the injured employee against a third-party. *Bloomer, supra.* To the extent that Louisiana law equates a waiver of subrogation with the release of a joint tortfeasor, it is clearly inconsistent with Federal Law. Accordingly, it is submitted that Louisiana law may not be applied on this point. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L. Ed. 2d 360 (1969).[4]

CONCLUSION

Petitioner's case does not present any novel question of Federal law. On the contrary, the issue is one of Louisiana law which was properly resolved by

4. This argument was urged below; however, since the Court found that no release existed, it did not reach this point. *LeBlanc v. PETCO, supra,* at n. 2, p. 619.

the Court below. Since the issue, as resolved by the Court below, does not reach a decision contrary to decisions of the Louisiana Supreme Court, there is no basis for issuing the writ of certiorari as requested by petitioner. Accordingly, respondent, American Home Assurance Company, prays that the petition for writ of certiorari be denied.

RESPECTFULLY SUBMITTED,

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ATTORNEYS FOR AMERICAN HOME ASSURANCE CO.

CERTIFICATE OF SERVICE

The undersigned counsel for respondent has caused three copies of the foregoing Opposition to Petition for Writ of Certiorari to be served on Charles M. Thompson, Jr., Esq. of Thompson, Sellers & Bundick, Post Office Box 308, Abbeville, Louisiana 70510 by placing same in the United States Postage Service, first class postage prepaid, this 4th day of November, 1981.

SCOTT E. SILBERT